Supreme Court

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ALEXIS COLON, Estate of the Decedent by Personal Representative Peaches Martinez, LUIS COLON, PEACHES MARTINEZ and ALEXANDER MARTINEZ,

Petitioners,

v.

UNITED STATES OF AMERICA, WADDELL, Lt. Col., TYRONNE S. LEONARD, Staff Sergeant, McDONALD, Staff Sergeant, DAX ARIES, Sergeant,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

1. Should the *Feres* doctrine bar claims by a member of the military for injuries due to sexual harassment, by her fellow service members?

2. Is it a denial of equal protection of the law to bar claims of a military service member for injuries due to sexual harassment and retaliation under the *Feres* doctrine, when claims related to racial harassment have not been *Feres*-barred?

3. Are sexual harassment and retaliation for reporting sexual harassment activities incident to military service?

4. Does the superior rank of a sexual harasser justify barring a victim's claims against him under the *Feres* doctrine?

5. Should the *Feres* doctrine be held inapplicable when it immunizes conduct for personal motives rather than for a military purpose?

6. Should the *Feres* doctrine be overturned or limited?

PARTIES TO THE PROCEEDING

PETITIONERS/PLAINTIFFS:

The Estate of Decedent ALEXIS COLON by Personal Representative Peaches Martinez

LUIS COLON

PEACHES MARTINEZ

ALEXANDER MARTINEZ

RESPONDENTS/DEFENDANTS:

THE UNITED STATES

WADDELL, LT. COL. U.S. ARMY

TYRONNE S. LEONARD, SSGT, U.S. ARMY

JOHN ROBERT McDONALD

DAX ARIES

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PETITION FOR A WRIT OF CERTIORARI

The Estate of Alexis Colon, by Personal Representative Peaches Martinez, her husband Luis Colon, and her parents Peaches Martinez and Alexander Martinez petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The May 7, 1997 opinion of the United States Court of Appeals for the Fifth Circuit and the orders from the Northern District of California and the Western District of Texas which it affirms are not reported.

JURISDICTION

The order sought to be reviewed was entered May 7, 1997 by the United States Court of Appeals for the Fifth Circuit. No petitions for rehearing were filed. This Court has jurisdiction of this Petition, under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitution:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV. Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

28 U.S.C. 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 1346(b).

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damage accruing on and after January 1, 1945 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2672.

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of

the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2679(d)(1).

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

10 U.S.C. 502.

I ___, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.

Rules:

Sexual harassment is a form of sex discrimination . . . [it includes] verbal or physical contact of a sexual nature. Sexual harassment occurs when: (1) Submission to or rejection of such conduct is made either explicitly or implicitly a

> term or condition of a person's job, pay, or career.
>
> . . .
>
> (3) such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment . . .
>
> a. Sexual harassment . . . will not be tolerated.
>
> . . .
>
> d. Individuals will not be intimidated, harassed, or retaliated against for exercising their lawful rights to address their concerns.
>
> *Ft. Hood, Texas, Command Policy No.* 22, App. 58.

STATEMENT OF THE CASE

Specialist 4th Class Alexis Colon, now deceased, and her husband, Luis Colon were members of the Army, stationed at separate Fort Hood, Texas, Dental Clinics when the events leading to this case occurred. From December, 1991, until she died, Alexis Colon was sexually harassed at work and after work at Fort Hood Dental Clinic, No. 5. The harassment was so severe that Alexis experienced anxiety, weight loss, sleeplessness and depression. After she objected to the harassing conduct by McDonald and Aries, they retaliated against her in the workplace. She and her husband then reported the harassment Alexis was experiencing to their Sergeant Major. She gave a written statement which described being propositioned for sex, being spoken to about group sex, vaginal odor, necrophilia and other lewd comments by McDonald and which described having Aries place his

hands on her neck, run his fingers through her hair and kiss her on the cheek. App. 55-57.

Luis and Alexis were informed by the Sergeant Major that the two harassers would be moved out of the area where she was assigned. Instead they remained in the work place; and within two days of her complaint to the Sergeant Major Alexis was accused of being a sexual harasser and of conduct unbecoming a solder. Respondents Waddell and Leonard issued Colon a written reprimand which threatened her with prosecution under the UCMJ and required her to teach a class on sexual harassment to her co-workers. App. 51-54. Within hours of the accusations and reprimand, twenty-six year old Alexis, who had an exemplary record as a soldier, committed suicide, leaving behind a note which makes it clear that she was so devastated that she was "too weak to face these people." She had been made to feel "too weak and ashamed to live." App. 50.

The Army subsequently admitted that Alexis' work place was not a healthy environment, that a noncommissioned officer's sexually oriented comments to her had constituted sexual harassment; were offensive and had contributed to a hostile work environment. When the petitioners gave administrative notice of their tort claims, the Army denied them, citing *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984) and claiming that the *Feres* doctrine barred any recovery for the admitted sexual harassment which had led to Colon's death.

September 8, 1993, petitioners filed suit, bringing claims against the United States under 28 U.S.C. 2672, *et seq.*, the FTCA, for its negligence and wrongful acts and

omissions, *see, Sheridan v. United States,* 108 S.Ct. 2449, 2455 (1988). Petitioners also brought claims against individual defendants Waddell, Leonard, McDonald and Aries under common law for malicious conduct leading to Colon's wrongful death and under *Bivens* for violation of their Liberty, Property, Due Process and Equal Protection rights, under Amendments I, V and XIV and under 42 U.S.C. 2000, which is reflected in Command Policy No. 22, App. 58. Petitioners' allegations of what occurred, as well as the following facts are substantially uncontested: Sexual harassment is contrary to the stated objectives of the U.S. Army to support the Constitution of the United States and to abide by the Uniform Code of Military Justice. It is a violation of the Army's laws and policies; and it was not part of Alexis Colon's, or any defendant's military duties or job description. It serves no conceivable military purpose. It is not part of military discipline and it is not reasonable conduct, incident to military service. Sexual harassment is not necessary to the furtherance of any military activity.

The United States, Waddell and Leonard filed no Answers and no Affidavits in support of their motions to dismiss. Waddell filed an Affidavit opposition to McDonald's petition for certification under 28 U.S.C. 2679(d)(1), that his conduct toward Colon was within the scope of his employment. Four orders were entered in response to motions by the various defendants, granting dismissal of all of petitioners' common law, FTCA and *Bivens* claims, based on *Feres v. United States,* 340 U.S. 135 (1950). None of these orders addresses the plain language of the FTCA, or petitioners' fundamental rights. *Order as to the United States,* App. 37; *Waddell and Leonard,* App. 29,

McDonald, App. 10, *Aries*, App. 4. The order concerning McDonald finds that he was motivated by a personal obsession and pursued his own personal gratification, outside the scope of his duties, when he harassed Colon; but even though McDonald is denied scope certification, all of petitioners' claims against him are barred by *Feres*. App. 21, 24.

May 7, 1997, in a summary opinion, the Court of Appeals for the Fifth Circuit held that "However disturbing plaintiffs' accusations might be, we do not have jurisdiction to hear them . . . [C]riticisms of the policies embodied in *Feres* and *Chappell* are beside the point." App. 2, 3. The court cited *Miller v. United States*, 42 F.3d 297, 303 (5th Cir. 1995) which holds that concern for preserving military discipline is "the most important consideration in any single case." App. 3. Petitioners, who respectfully believe that the Constitution and constitutional rights are more important considerations than deference to a breakdown of military discipline now file this Petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has decided important questions of federal law concerning the rights of a member of the military injured by sexual harassment. It has declared that under *Feres v. United States*, 430 U.S. 15 (1950), it lacks subject matter jurisdiction because Colons' claims are attempts to collect money damages for an injury incident to active duty military service and has refused to consider petitioners' allegations, leaving them with no

remedy. Important questions of federal law concerning the fundamental civil rights of a military woman who is sexually harassed have not been, but should be settled by this Court.

The various circuits are unsettled in their interpretations of claims by service members, as to what constitutes a claim for an "injury incident to military service" that is barred by the *Feres* doctrine. Since 1950, the inception of the doctrine, circuit courts have struggled to analyze and apply the *Feres* holding, often issuing opinions that are not easily usable as clear precedent. Claims for death or injury due to drunkenness that causes a soldier to fall into a ditch or crash his car are not barred by the *Feres* doctrine as incident to service. *Dreier v. United States*, 106 F.3d 844 (9th Cir. 1996), 95 F.3d 1435 (9th Cir. 1996); *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995), 45 F.3d 598 (1995). Claims related to auto accidents involving service members, *Durant v. Neneman*, 884 F.2d 1350 (10th Cir. 1989); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); the military's failure to follow its own regulations, *Johnson v. United States*, 704 F.2d 1431, 1439-40 (9th Cir. 1983), *Ordahl v. United States*, 601 F.Supp. 96, 100 (D.Montana 1986); and claims against military personnel who participated in racial harassment, *Brown v. United States*, 739 F.2d 362, 368, 369 (8th Cir. 1984) have not been barred under *Feres*. But illegal, non-military, sexual harassment and retaliation that drove Alexis Colon to such despair that she lost her life have been deemed "incident to service" and *Feres*-barred. App. 4, 10, 22, 23, 29 and 37.

The facts of this case are most closely approximated by *Stubbs*, at 774 F.2d 58, which contains an inherent denial of equal protection, but nevertheless has been

relied upon by Respondents and discussed in orders granting dismissal. App. 42. *Stubbs* was issued in 1984, by an Eighth Circuit that was divided on the subject of *Feres*. A few months prior to holding that Dawn Stubbs' suicide rather than face further sexual harassment and retaliation was "incident to service," a different panel of the circuit held that tort claims against *participants* in the mock lynching of an African American soldier were not *Feres*-barred. Even though *Frontiero v. Richardson*, 411 U.S. 677, 680, 686 (1973) and *Schlesinger v. Ballard*, 419 U.S. 498 (1975) had previously made it clear that military women were entitled to equal protection of the law; the outcomes in *Stubbs* and *Brown* demonstrate that in 1984, the right to be free of sexual harassment was not considered of equal importance with the right to be free of racial harassment. The presence of the flawed *Stubbs* holding as cited authority in these proceedings, indicates that in 1997, there is still a need for this court to address the right of military women to equal protection of the law.

The rank of a sexual harasser or a victim of sexual harassment should not determine the availability of a remedy for civil rights violations, if all are equal under the law. Yet, when Major Lutz' claims against the sergeants who harassed her were permitted, *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991); and Specialist Colons' claims against sergeants who harassed her are barred, constitutional protections are available to some but not others, based on rank. The Fifth Circuit's reference to the *Brown* racial harassment case and its dismissal of claims against superior officers disregards the portion of the ruling that permitted claims against direct harassers as "participants" without mention of their rank.

App. 2. *Brown*, at 739 F.2d 369. The message of the holding in this case, is that a member of the military is free to sexually harass anyone subordinate to him in the chain of command and the victim will have no recourse. Where there has been a denial of equal protection, as here, it is the duty of the courts to fashion a remedy. *United States v. Virginia*, 116 S.Ct. 2264, 2284 fn. 19, 135 L.Ed.2d 735 (1996).

The *Feres* doctrine is a rule of negligence law. That is its original purpose. It was never intended to determine civil rights or sexual harassment issues. In 1950 there were relatively few women in the military and sexual harassment issues were not before the Court or the public, as they are today. Since 1950, *Feres* has been so broadly and subjectively expanded that it has effectively become a presumptive bar to claims by members of the military which few can overcome, regardless of the merit of their cases. The case by case analysis contemplated in *United States v. Shearer*, 473 U.S. 52, 59, 105 S.Ct. 3039, 3043, 87 L.Ed. 36 (1985) has fallen by the wayside. *Miller* at 42 F.3d 303.

The Fifth Circuit's dismissal of Colons' claims extends the *Feres* doctrine beyond the holdings in *Chappell v. Wallace*, 462 U.S. 294 (1983) and *United States v. Stanley*, 107 S.Ct. 3054, 483 U.S. 669 (1987), even though, " . . . [N]o holding can be broader than the facts before the court." *Id., Stanley*, at 483 U.S. 680. Under the facts of this case, Petitioners' claims do not touch on sensitive military affairs. It would enhance, rather than intrude on military discipline to address the rights at issue in this case. Sexual harassment has no place in the "specialized

society" that is the military. Any sort of unity, commitment or esprit de corps that is strengthened by sexual harassment is intolerable. *United States v. Johnson,* 107 S.Ct. 2063, 2069, 481 U.S. 690 (1987), refers to the specialized environment of the military as necessary to its function and deserving of deference from the judiciary. However, protection of sexual harassers is a discriminatory affront to the Constitution and to rights of a military woman who must tolerate such an environment.

The petitioners' common law tort claims are an example of the well recognized right of access to the courts by a service member who has suffered injury and oppression by those in authority, based on considerations other than "public ends." *Wilkes v. Dinsman,* 12 L.Ed. 619, 636 (1849). This common law right was not disturbed by *Chappell,* 462 U.S. at 305, fn.2. Unlike military drug experimentation in *Stanley,* at 107 S.Ct. 3063, 483 U.S. 683, sexual harassment is not necessary to the furtherance of any activity incident to military service. Petitioners' claims should be permitted to stand.

The *Feres* doctrine should be overturned. The plain language of the statute, 28 U.S.C. 2672, et seq., refers to claims, not to any claim but that of service members. *Brooks v. United States,* 337 U.S. 49, 51, 60 S.Ct. 918, 919 (1949). The Court has gone beyond the intent of the legislature, which should have limited it, by over expanding *Feres. Brown v. Barry,* 3 U.S. 365, 367, 3 Dall 365, 1 L.Ed. 638 (1797). There would be no adverse effect on the military due to petitioners' claims, under the language of the FTCA statute, strictly construed. Petitioners' allegations are sufficient to invoke the court's jurisdiction under 28 U.S.C. 1346(b). As long as the facts are sufficient

to invoke a court's jurisdiction, it "must entertain the suit" and use any available remedy where a wrong of constitutional proportions has been done. *Bell v. Hood*, 327 U.S. 678, 681-82, 66 S.Ct. 773, 775-76, 777 (1945).

Judicial deference to the military enables it to be a haven for civil rights violations that defy our Constitution and that would not be countenanced elsewhere in our society. Such deference is adverse to the balance inherent in our democracy, where it is the function of the military to uphold the Constitution. 10 U.S.C. 502. Former Chief Justice Warren spoke eloquently about the balance between fundamental rights and deference to the military:

> On the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution. While situations may arise in which deference by the Court is compelling, the cases in which this has occurred demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom. Fortunately, the Court has generally been in a position to apply an exacting standard. Thus, although the dangers inherent in the existence of a huge military establishment may well continue to grow, we need have no feeling of hopelessness. Our tradition of liberty has remained strong through recurring crises. We need only remain true to it.

. . .

> [O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.

Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 188 (1962).

CONCLUSION

The petitioners claims should stand, without the impediments of the *Feres* doctrine. "There is no 'military exception' to the Constitution." *Steffan v. Aspin*, 8 F.3d at 62 (D.C. Cir. 1993) (citing *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981), *rev'd on other grounds en banc, sub nom. Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994), *cert. den.*, 471 U.S. 1053, 105 S.Ct. 2113 (1995).

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50233

Summary Calendar

ALEXIS COLON, Estate of Decedent by Personal Representative Peaches Martinez, Luis Colon; PEACHES MARTINEZ; ALEXANDER MARTINEZ; LUIS COLON,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA; WADDELL, Lieutenant Colonel; TYRONNE S. LEONARD, Staff Sergeant; McDONALD, Sergeant; ARIES, Sergeant,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas, Waco
(W-95-CV-67)

(Filed May 7, 1997)

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:*

The plaintiffs brought this suit on behalf of themselves and Alexis Colon, a member of the armed forces stationed at Fort Hood. The complaint alleges that Colon committed suicide after being subjected to sexual harassment by her superiors. According to the plaintiffs, not only was Colon a victim of harassment, but the individual defendants retaliated against her for reporting their harassment by wrongly accusing Colon herself of engaging in sexual harassment.

However disturbing the plaintiffs' accusations may be, we do not have jurisdiction to hear them. The Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, does not waive governmental immunity when a member of the armed forces on active duty seeks money damages based on an injury suffered while performing military tasks at a military base and inflicted by superior officers. *Feres v. United States*, 340 U.S. 135 (1950); *Schoemer v. United States*, 59 F.3d 26, 28-29 (5th Cir.), *cert. denied*, 116 S. Ct. 519 (1995). Even a case touted by the plaintiff, *Brown v. United States*, 739 F.2d 362, 369 (8th Cir. 1984), *cert. denied*, 473 U.S. 904 (1985), in which enlisted men subjected a black private to a mock lynching, recognized that a plaintiff's "claims against the United States and his superior officers for failing to prevent the incident, and against his superior officers for failing to perform a proper investigation, are barred by the *Feres* doctrine." The Supreme Court has

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

similarly held that the reasoning in *Feres* serves to bar *Bivens* claims. *Chappell v. Wallace,* 462 U.S. 300 (1983).

As we have recognized in the past, criticisms of the policies embodied in *Feres* and *Chappell* are beside the point. "The *Feres* doctrine has been reaffirmed by the Supreme Court many times since its inception in the face of strong criticism of the equity of the rule." *Miller v. United States,* 42 F.3d 297, 307 (5th Cir. 1995). We are bound to follow that precedent.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ESTATE OF ALEXIS COLON, Decedent, by Personal Representative PEACHES MARTINEZ, LUIS COLON, PEACHES MARTINEZ, and ALEXANDER MARTINEZ, individually,	§	CIVIL ACTION NO. W-95-CA-067
Plaintiffs,	§	
v.	§	
THE UNITED STATES OF AMERICA, LIEUTENANT COLONEL WADDELL, STAFF SERGEANT THRONE S. LEONARD, SERGEANT MCDONALD and SERGEANT ARIES.	§	
Defendants.	§	

ORDER

(Filed Jun. 19, 1996)

Came on this date to be considered the Motion to Dismiss and for Judgment on the Pleadings filed by Defendant Dax Aries ("Aries") in this case. Having reviewed Defendant's motion and Plaintiff's response, the Court has determined it is meritorious and should be granted.

This case arises out of the unfortunate death of Alexis Colon ("Colon") by a self-inflicted gunshot wound

on April 29, 1992. At the time of her death, Colon was a Specialist on active duty in the United States Army. She was stationed at Fort Hood, Texas and was assigned as a Dental Technician at Dental Clinic #5. Plaintiffs, Colon's surviving family, assert that Colon was sexually harassed from the time she arrived at Fort Hood in December 1991, which ultimately resulted in her death. The final straw, according to Plaintiffs' complaint, was when Colon was reprimanded after having filed a complaint of sexual harassment with her superior officer.

The other Defendants in this action, including the United States of America, were dismissed from this suit either by this Court and by the District Court for the Northern District of California, where the case was originally filed. As was found in those previous orders, plaintiffs' claims against Defendant Aries are barred by the *Feres* doctrine. *See Feres v. United States*, 340 U.S. 135 (1950).

> The *Feres* doctrine is a judicially created exception to the broad waiver of immunity established by the FTCA. The essence of the doctrine is that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of acting incident to service."

Miller v. United States, 42 F.3d 297, 300 (5th Cir. 1995), quoting *Feres v. United States*, 340 U.S. at 159. Under this doctrine, the Court evaluates whether the injured serviceman was injured while working in the course of his service, rather than analyzing whether the one who injured him was operating within the scope of his employment.

A serviceman whose injuries arise out of or occur in the course of his service is precluded from suing not only the Government, but also his superior officers,[1] as well as fellow servicemen and civilian personnel.[2] The doctrine precludes suits under the Federal Tort Claims Act,[3] as well as suits under Title VII,[4] suits claiming deprivations of constitutional rights,[5] and suits based upon state tort claims.[6]

In determining whether a serviceman's injuries were incident to his military service, the Court must examine the totality of the circumstances in light of the rationale behind the *Feres* doctrine. *Schoemer v. United States*, 59 F.3d 26 (5th Cir. 1995); *Miller v. United States*, 42 F.3d at 403. The three major elements that the Court evaluates include the serviceman's duty status, the site of his injury, and the activity he was performing when injured. *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980). *See also Schoemer v. United States*, 59 F.3d at 28.

> While no single factor is necessarily dispositive, our applications of the *Parker* test – and, indeed, the results of our cases decided before *Parker's* exposition of it – demonstrate that the duty

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[1] *See Chappell v. Wallace*, 462 U.S. 294 (1983).

[2] *See United States v. Stanley*, 483 U.S. 667 (1987).

[3] *See United States v. Shearer*, 473 U.S. 52 (1985).

[4] *See Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991); and *Gonzalez v. Dept. of the Army*, 718 F.2d 926 (9th Cir. 1983).

[5] *See Chappell v. Wallace*, 462 U.S. 294 (1983).

[6] *See Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987).

> status of the service member is usually considered the most indicative of the nature of the nexus between him and the [G]overnment at the time of injury and is therefore the most important factor.

Miller v. United States, 42 F.3d at 301, quoting *Adams v. United States*, 728 F.2d 736, 739 (5th Cir. 1984).

As noted in the previous Order granting Defendant McDonald's motion to dismiss,

> the allegations of Plaintiffs' complaint reflect that Colon was on active duty during the times relevant to this action, that the vast majority of the events occurred on Fort Hood, and that the majority of the events occurred while Colon was at her regular assignment at the dental clinic. Even if the Court were to conclude that most of the incidents of sexual harassment occurred off-base and while Colon was not on active duty, the *Feres* doctrine would still bar Plaintiffs' claims. The primary incident which Plaintiffs assert led to Colon's death was the allegedly retaliatory reprimand given to her by Defendant Aries, the resulting accusation and investigation of sexual harassment against her, and the eventual reprimand from her superior officers. Were these claims permitted to continue, it would necessarily involve an intrusion into military decisions regarding the discipline of its personnel. As the *Shearer* court noted, the location of the act is "not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline. . . . " *United States v. Shearer*, 473 U.S. at 57 (citations omitted). Unlike a claim arising out of a car

> accident or some similar claim of negligence, "the claim here would require Army officers 'to testify in court as to each other's decisions and actions.' " *Id.*, quoting *Stendel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977).
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> > To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a solider's [sic] off-base conduct. But as we noted in *Chappell v. Wallace*, such " 'such complex, subtle, and professional decisions as to the composition training, . . . and control of a military force are essentially professional military judgments.' " 462 U.S., at 302, 103 S.Ct., at 2366. . . .
>
> *Id.*, quoting *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973). Plaintiff's claims are, therefore, barred.

Order entered January 30, 1996 at 16-17.

Plaintiffs further argue that dismissal of the claims against Defendant Aries is inappropriate due to the "obstruction, delay and multiplication of proceedings" resulting from Defendant Aries' failure to timely file an answer. The Court has already addressed this issue in connection with Defendant Aries' Motion to Set Aside Entry of Default and for Leave to File Out of Time Answer. Accordingly, it is

ORDERED that Defendant Aries' Motion to Dismiss and for Judgment on the Pleadings is **GRANTED.**

SIGNED this 18th day of June, 1996.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

ESTATE OF ALEXIS COLON, Decedent, by Personal Representative PEACHES MARTINEZ, LUIS COLON, PEACHES MARTINEZ, and ALEXANDER MARTINEZ, Individually,	§	CIVIL ACTION NO. W-95-CA-067
Plaintiffs,	§	
v.	§	
THE UNITED STATS OF AMERICA, LIEUTENANT COLONEL WADDELL, STAFF SERGEANT TYRONNE S. LEONARD, SERGEANT MCDONALD and SERGEANT ARIES,	§	
Defendants.	§	

ORDER

(Filed Jan. 30, 1996)

This case arises out of the unfortunate death of Alexis Colon ("Colon") by a self-inflicted gunshot wound on April 29, 1992. At the time of her death, Colon was a Specialist on active duty in the United States Army. She was stationed at Fort Hood, Texas and was assigned as a Dental Technician at Dental Clinic #5. Plaintiffs assert that Colon was sexually harassed from the time she arrived at Fort Hood in December 1991, which ultimately

resulted in her death. The factual basis for Plaintiffs' claim is that Colon filed a complaint of sexual harassment with her superior, Sergeant Major Hutchens, against Sergeants McDonald and Aries. On April 29, 1992 Colon was informed by Lieutenant Colonel Waddell, the officer in charge of the dental clinic, and Sergeant Leonard that a written reprimand was being issued against her for sexual harassment. She was threatened with disciplinary measures if additional incidents of sexual harassment occurred, and she was directed to teach a class on sexual harassment. She took her own life later that day.

This case was originally filed in the United States District Court for the Northern District of California. After the filing of various dispositive motions, the California court dismissed the United States and Defendants Waddell and Leonard from this action. The case was then transferred to the Western District of Texas. The only remaining Defendants, therefore, are Sergeants McDonald and Aries.

Plaintiffs' claims appear to be as follows: (1) a common law claim for some sort of wrongful death, sexual harassment or some form of intentional infliction of emotional distress;[1] (2) negligence under the Federal Tort

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[1] The Plaintiffs are not precise as to the nature of this cause of action. The Original Complaint states,

> The malicious conduct of defendants Waddell, Torrance, Aries and McDonald, jointly and severally, was the direct and proximate cause of the death of plaintiff Alexis Colon and of the damages suffered by

Claims Act; and (3) a deprivation of Colon's constitutional rights.[2]

Sergeant McDonald has moved to dismiss the claims against him under the authority of the *Feres* doctrine. *See*

> Luis Colon. Alexander Martinez and Peaches Martinez.
>
> > A. Alexis Colon suffered severe emotional and physical distress and ultimately lost her life;
> >
> > B. Plaintiff Luis Colon has endured and in the future, will continue to endure extreme grief, pain and suffering and loss of enjoyment of life; and has lost the care, companionship, society, services, support and consortium of his beloved wife;
> >
> > C. Peaches and Alexander Martinez have lost the support, society, companionship and services of their daughter, Alexis Colon; and have endured and in the future, will continue to endure mental and emotional grief, pain and suffering and loss of enjoyment of life.

Original Complaint, paragraphs 33-34.

In their response and objection to Defendant McDonald's Memorandum in Support of defenses of absolute and qualified immunity and failure to state a claim, the Plaintiffs note, "Plaintiffs' first cause of action is plead as a wrongful death claim and not a personal injury claim." Plaintiff's Response, p. 7. However, Plaintiffs subsequently note in the same pleading that their first cause of action properly includes the elements of a claim for intentional infliction of emotional distress. *Id.* p. 9.

[2] As with their first cause of action, this third cause of action is not exactly a model of clarity. Plaintiffs assert every kind of Constitutional violation that could occur, including deprivation of life, liberty and due process, as well as a violation of Colon's equal protection rights. Plaintiffs additionally cite to Title VII as forming the basis for their third claim.

Feres v. United States, 340 U.S. 135 (1950). He has also requested a review of the United States' decision to deny scope certification under 28 U.S.C. § 2679(d)(3). The United States has moved for summary judgment as to this issue. Having reviewed the parties' briefs, the applicable authority, and the summary judgment proof presented, the Court is persuaded the United States' motion for summary judgment should be granted, Defendant McDonald's cross-motion for summary judgment should be denied, and Defendant McDonald's motion to dismiss for lack of subject matter jurisdiction and motion to dismiss for failure to state a cause of action and for judgment on the pleadings should be granted.

I. SUMMARY JUDGMENT

Summary Judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is in genuine dispute if the evidence would allow a jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

The initial burden to demonstrate the absence of a genuine issue of material fact is on the moving party. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). This burden can be satisfied by establishing that there is an absence of evidence to support an essential element of the non-moving party's case. *Id.* Upon such a showing, the burden shifts to the non-moving party to establish that there

is a genuine issue. *Id.* at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

II. DISMISSAL

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), quoting 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 at 598 (1969). It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Boudeloche v. Grow Chemical Coatings Corp.*, 728 F.2d 759, 762 (5th Cir. 1984); *Kaiser*, 677 F.2d at 1050. When considering such a motion, the complaint must be liberally construed in the plaintiff's favor, and all facts pleaded in the complaint should be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986). "The question therefore is whether in the light most favorable to Plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Wright and Miller, *Federal Practice and Procedure*, Section 1357 at 601.

III. DISCUSSION

A. *Westfall Act.* Congress, in response to the Supreme Court opinion in *Westfall v. Erwin,* 484 U.S. 292, 108 S.Ct. 580 (1988), expanded the immunity of federal employees under the Federal Tort Claims Act. 28 U.S.C. § 2679. Under the so-called Westfall Act, a federal employee enjoys absolute immunity from suit for common law torts committed while acting within the scope of employment.[3] *See Arthur v. United States,* 45 F.3d 292 (9th Cir. 1995). This immunity does not apply to actions brought against an employee for violations of the Constitution or laws of the United States. 28 U.S.C. § 2679(b)(2). Therefore, Plaintiffs' claim that Defendant McDonald violated the Constitutional rights of Colon are unaffected by the United States' motion for summary judgment.

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[3] The statute provides:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

28 U.S.C. § 2679(b)(1).

If a suit is brought against a federal employee, the Attorney General makes the determination of whether the employee was acting within the scope of his office or employment. 28 U.S.C. § 2679(d)(1).[4] If so, then the United States is substituted as the party defendant and the suit proceeds as any other against the United States under the Federal Tort Claims Act. If the Attorney General refuses to certify that an employee was acting within the scope of his office or employment, the employee may then request the court to make such a certification and to substitute the United States as the party defendant.[5] The Attorney General's decision regarding certification is conclusive unless challenged. *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 58

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[4] The statute provides:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

[5] The statute provides, in pertinent part:

In the event the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(1994). The party challenging the Attorney General's certification decision bears the burden of disproving it by a preponderance of the evidence. *Id. See also Williams v. United States*, 71 F.3d 502 (5th Cir. 1995).

In order to determine whether an employee's actions were within the scope of employment under the Westfall Act, the Court must apply the law of the state in which the employee's conduct occurred. *Garcia v. United States*, 62 F.3d 126 (5th Cir. 1995). Texas law is, therefore, applicable to this case.

Under Texas law, the scope of employment determination is analyzed under the theory of respondeat superior. *Id.*, citing *Mata v. Andrews Transport, Inc.*, 900 S.W.2d 363, 366 (Ex.App. – Houston [14th Dist.] 1995) ("employers may be held liable for negligent acts by their employees under a theory of respondeat superior only if the employee's actions are in the course and scope of their employment"). The employee's act need not have been expressly authorized by the employer, but must have been:

> (1) within the general authority given him;
>
> (2) in furtherance of the employer's business; and
>
> (3) for the accomplishment of the object for which the employee was employed.

Mata v. Andrews Transport, Inc., 900 S.W.2d at 366. An employer may be liable for an employee's acts even if those acts are expressly contrary to the employer's orders, so long as the employee's act "was within the general scope of his authority." *Country Roads, Inc. v. Witt*, 737 S.W.2d 362, 364 (Tex.App. – Houston [14th Dist.]

1987, no writ). However, the employer is not responsible for the acts of an employee who deviates from the performance of his duties for his own, personal purposes. *Drooker v. Saeilo Motors*, 756 S.W.2d 394, 397 (Tex.App. – Hosuton [sic] [1st Dist.] 1988, writ denied). *See also Viking v. Circle K Convenience Stores*, 742 S.W.2d 732, 734 (Tex.App. – Houston [1st Dist.] 1987, writ denied) ("An employer is not liable for actions that an employee takes in his own interests and not to further the purpose of carrying out the master's business").

In order to determine whether Defendant McDonald's actions were within the scope of his employment, it is first necessary to ascertain what acts he allegedly performed. Thus, the Court must analyze not only the allegations of Plaintiffs' complaint, but the affidavits and statements attached to the parties' summary judgment motions. The original complaint identifies Defendant McDonald as "the Sergeant who is named by plaintiff decedent in her written statement as subjecting her to harassment and lewd talk." Original Complaint, paragraph 13. The pleadings and summary judgment proof presented establish the following:

1. "McDonald was assigned as the supply sergeant for the clinic and was responsible for maintaining and dispensing supplies." Declaration of Henry T. Waddell, Jr., Exhibit A to United States' Motion for Summary Judgment.

2. "Specialist Colon was assigned as a preventative dentistry specialist and was responsible for cleaning teeth and carving fillings." *Id.*

3. On one occasion, Defendant McDonald gave Colon a ride to an appointment, during which Defendant McDonald talked about various sexual encounters he had with other female Army personnel. He additionally questioned Colon about her sexual encounters. Statement of Alexis Colon, Exhibit B to Plaintiff's Original Complaint.

4. On another occasion, while Colon was waiting for her husband to pick her up from work, Defendant McDonald joined her and again discussed his sexual encounters. He ended the conversation by stating "I better stop before I get in trouble for sexual harrasment [sic]." *Id.*

5. On a separate occasion, Defendant McDonald made lewd comments about the women's softball team while gathered with other employees at the clinic's conference room. Defendant McDonald also said that males were better at softball than women. *Id.*

6. When new chairs were delivered to the clinic, all personnel were assigned to remove the left-over trash. Defendant McDonald said to leave the lightweight trash for the females, "so they will have something to do." *Id.*

7. Another conversation occurred in the dental clinic conference room regarding necrophilia, which caused Defendant McDonald to laugh. *Id.*

8. Defendant McDonald and Colon had a friendly relationship outside of the dental clinic, and were friends before McDonald became a sergeant. Exhibits B and D to United States' motion for summary judgment.

8. On April 24, 1992, Defendant McDonald and Colon had an altercation regarding the delivery of supplies. Colon questioned when supples would be delivered to Bay 1, and Defendant McDonald told her he would put her list at the bottom if she continued asking him every ten minutes for supplies. When the exchange became heated, Sergeant Aries told Colon to "At Ease." When Colon continued to talk, Sergeant Aries said he would give her an Article 15 if she did not "At Ease." Colon approached Defendant McDonald later that day to again attempt to explain the Bay 1 supply situation, and Defendant McDonald told her that voicing her opinion could get her in trouble. *Id.*; Statement of John R. McDonald, Exhibit B to United States' Motion for Summary Judgment.

9. Later the same day, Colon told Defendant McDonald that he was being paged, but he ignored her. Statement of Alexis Colon.

10. On April 27, 1992, Colon filed a charge of sexual harassment against Sergeants McDonald and Aries. Both the sergeants and Colon were questioned, and corrective action was taken against both Colon and Defendant McDonald. Affidavit of John R. McDonald attached to Defendant McDonald's Response to United States' Motion for Summary Judgment.

As noted, an employer is liable for the actions of his employee under Texas law when those actions are for the purpose of furthering his employer's business rather than some business of his own. *Viking v. Circle K Convenience Stores*, 742 S.W.2d at 734. In this case, if all of the allegations of Plaintiffs' complaint are presumed as true, the

actions of Defendant McDonald served no purpose but that of personal gratification.

Defendant McDonald cites to *Bushell v. Dean*, 781 S.W.2d 652 (Tex.App. – Austin 1989), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991) as support for his contention that he was acting within the course and scope of his duties. In *Bushell*, the plaintiff was subjected to offensive sexual invitations and touching by her direct supervisor, who then increased her work load when she spurned him. Due to an angry altercation, the plaintiff resigned her position. The plaintiff brought suit for assault, intentional infliction of emotional distress, and sexual harassment. The court determined that the actions taken by the supervisor in retaliating against the plaintiff were within his general authority and furthered the object for which he was hired.

The facts of the present case are more similar to those reported in *Kelly v. Stone*, 898 S.W.2d 924 (Tex.App. – Eastland 1989, writ denied), in which the plaintiff also sought damages for intentional infliction of emotional distress and assault arising out of a claim of sexual harassment. In the *Kelly* case, the plaintiff was subjected to lewd comments and offensive touching by a manager in her office. However, as in the present case, the manager was not her direct supervisor but did hold a position of authority over her. Also, the plaintiff and the manager had a relationship outside of the office. Finally, although the plaintiff reported the harassment to her supervisor, no action was taken by the company and the plaintiff eventually resigned her position. In distinguishing *Bushell*, the *Kelly* court noted:

> McArthur was hired to manage and supervise the "office services division" of the Cooperative. McArthur's duties at the Cooperative did not include the use or threat of physical force or physical conduct against employees, nor did Stone ever direct McArthur to assault or inflict emotional distress on Kelly. There is no evidence to show that McArthur's conduct was in the furtherance of the Cooperative's business or for the accomplishment of the object for which McArthur was employed. While a manager can be expected to communicate with his subordinates, McArthur's comments to Kelly about his desires that they belonged together in this life, his comments about his marital problems, and his comments about Kelly's attire were not work related. Additionally, McArthur's assault against Kelly, the daily intercom calls to Kelly, and the audiotape that McArthur gave Kelly were not within the scope of general authority given to McArthur by the Cooperative.
>
> When only the evidence supporting the jury's finding is considered, the record clearly shows that McArthur was motivated by his personal obsession and that he pursued his own personal gratification. This was not in the furtherance of the Cooperative's business. Moreover, McArthur turned aside from his duties with the Cooperative to pursue purely personal interests. When he did so, McArthur ceased to act in the course and scope of his employment.

Kelly v. Stone, 898 S.W.2d at 928-929.

As can be seen from the foregoing, the vast majority of the sexually oriented comments made by Defendant McDonald apparently occurred at times when he was not

working at the dental clinic or apparently on break. As the Attorney General has denied certification, the burden is upon Defendant McDonald, who is contesting that decision, to prove by a preponderance of the evidence that he was working in the course and scope of his employment at all times relevant to the allegations in this lawsuit. This he has failed to do. Defendant McDonald has offered nothing to establish that the comments were made during the course of clinic meetings or other regularly scheduled work-related events, or that such comments were so common-place as to be a part of the day-to-day operation of the clinic. As in the *Kelly* case, it is clear that as to the sexually oriented conversations, Defendant McDonald was "motivated by his personal obsession and that he pursued his own personal gratification." *Id.* at 929.

The only "factual" events that occurred while Defendant McDonald was apparently on-the-job, were the altercation regarding the delivery of supplies and the investigation of Colon's complaints. There is nothing in the complaint to link the supply event with Plaintiff's claims of sexual harassment other than that it was also mentioned in her charge against the Sergeants. Further, Sergeant Aries was the individual who threatened to take corrective action against Colon, not Defendant McDonald. As to the sexual harassment investigation, it was initiated by Colon, not Defendant McDonald. There is additionally nothing to indicates that Defendant McDonald was responsible for the outcome of the investigation of Colon's sexual harassment complaint, beyond denying the charges and accusing her of willing participation in the sexually-explicit conversations. Defendant

McDonald has failed to carry his burden of proving that the actions of which he is accused occurred during the course and in the scope of his employment. Therefore, the Court is allowed to rely upon the presumption of correctness that is afforded the Attorney General's decision. As a result, the United States' Motion for Summary Judgment will be granted and Defendant McDonald's Petition for Scope Certification and Cross Motion for Summary Judgment will be denied.

B. *Feres Doctrine.* Whether the proper Defendant is Defendant McDonald or the United States, Plaintiffs' claims are barred by the *Feres* Doctrine. *Feres v. United States,* 340 U.S. 135 (195 [sic]).

> The *Feres* doctrine is a judicially created exception to the broad waiver of immunity established by the FTCA. The essence of the doctrine is that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of acting incident to service."

Miller v. United States, 42 F.3d 297, 300 (5th Cir. 1995), quoting *Feres v. United States,* 340 U.S. at 159. Under this doctrine, the Court evaluates whether the injured serviceman was injured while working in the course of his service, rather than analyzing whether the one who injured him was operating within the scope of his employment.

A serviceman whose injuries arise out of or occur in the course of his service is precluded from suing not only

the Government, but also his superior officers,[6] as well as fellow servicemen and civilian personnel.[7] The doctrine precludes suits under the Federal Tort Claims Act,[8] as well as suits under title VII,[9] suits claiming deprivations of constitutional rights,[10] and suits based upon state tort claims.[11]

In determining whether a serviceman's injuries were incident to his military service, the Court must examine the totality of the circumstances in light of the rationale behind the *Feres* doctrine. *Schoemer v. United States*, 59 F.3d 26 (5th Cir. 1995); *Miller v. United States*, 42 F.3d at 403. The three major elements that the Court evaluates include the serviceman's duty status, the site of his injury, and the activity he was performing when injured. *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980). *See also Schoemer v. United States*, 59 F.3d at 28.

> While no single factor is necessarily dispositive, our applications of the *Parker* test – and, indeed, the results of our cases decided before *Parker's* exposition of it – demonstrate that the duty status of the service member is usually considered the most indicative of the nature of the

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[7] *See United States v. Stanley*, 483 U.S. 667 (1987).

[8] *See United States v. Shearer*, 473 U.S. 52 (1985).

[9] *See Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991); and *Gonzalez v. Dept. of the Army*, 718 F.2d 926 (9th Cir. 1983).

[10] *See Chappell v. Wallace*, 462 U.S. 294 (1983).

[11] *See Holdiness v. Stroud*, 808 F.2d 417 (5th Cir. 1987).

> nexus between him and the [G]overnment at the time of injury and is therefore the most important factor.

Miller v. United States, 42 F.3d at 301, quoting *Adams v. United States*, 728 F.2d 736, 739 (5th Cir. 1984).

In this case, the allegations of Plaintiffs' complaint reflect that Colon was on active duty during the times relevant to this action, that the vast majority of the events occurred on Fort Hood, and that the majority of the events occurred while Colon was at her regular assignment at the dental clinic. Even if the Court were to conclude that most of the incidents of sexual harassment occurred off-base and while Colon was not on active duty. The *Feres* doctrine would still bar Plaintiffs' claims. The primary incident which Plaintiffs assert led to Colon's death was the allegedly retaliatory reprimand given to her by Defendant Aries, the resulting accusation and investigation of sexual harassment against her, and the eventual reprimand from her superior officers. Were these claims permitted to continue, it would necessarily involve an intrusion into military decisions regarding the discipline of its personnel. As the *Shearer* court noted, the location of the act is "not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair essential military discipline. . . . " *United States v. Shearer*, 473 U.S. at 57 (citations omitted). Unlike a claim arising out of a car accident or some similar claim of negligence, "the claim here would require Army officers 'to testify in court as to each other's decisions and actions.' " *Id.*, quoting *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977).

> To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in *Chappell v. Wallace*, such " 'such complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments.' " 462 U.S., at 302, 103 S.Ct., at 2366. . . .

Id., quoting *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973). Plaintiff's claims are, therefore, barred. In light of the foregoing, it is unnecessary to reach Defendant McDonald's request to dismiss based upon qualified immunity. Accordingly, it is

ORDERED that the United States' Motion for Summary Judgment is **GRANTED** and that Defendant McDonald's Cross Motion for Summary Judgment and Petition for Scope Certification are **DENIED.** It is further

ORDERED that Defendant McDonald's Motion to Dismiss for Lack of subject Matter Jurisdiction and Motion to Dismiss for Failure to State a Cause of Action and for Judgment on the Pleadings are **GRANTED** and Plaintiffs' claims against him are **DISMISSED.** It is further

ORDERED that Defendant McDonald's Motion to dismiss for Failure to State a Cause of Action and Motion for Judgment on the Pleadings Based on Qualified Immunity is **DENIED** as moot.

The only remaining Defendant in this action is Sergeant Aries. Return of service as to this Defendant was executed on October 7, 1994, however; he has not filed an answer or otherwise appeared in this action. Accordingly, it is

ORDERED that Plaintiffs file a motion for default judgment against Defendant Aries within eleven days from entry of this Order or this Defendant will be dismissed from this action for failure to prosecute.

SIGNED this 30th day of January, 1996.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ESTATE OF ALEXIS COLON, et al., Plaintiff, vs. THE UNITED STATES OF AMERICA, et al., Defendants.	No. C-93-3320 WHO **MEMORANDUM DECISION AND ORDER** (Filed May 10, 1994)

In this action for sexual harassment brought by plaintiffs, estate of Alexis Colon, Luis Colon (decedent Alexis Colon's husband), and Peaches and Alexander Martinez (decedent's parents), against the United States of America and Lieutenant Colonel Henry T. Waddell, Staff Sergeant Tyronne S. Leonard, Sergeant McDonald and Sergeant Aries all of the U.S. Army, seeking recovery for the death of Alexis Colon, defendants Waddell and Leonard have filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. For the reasons hereinafter stated, defendants' motion to dismiss is granted.

I.

This action arose from the circumstances surrounding the death of Alexis Colon on April 29, 1992, by a self-inflicted gunshot wound. At the time of her death, Alexis Colon was a Specialist on active duty in the United States Army, assigned to duty as a Dental Technician at Dental

Clinic # 5 at Fort Hood, Texas. Plaintiffs allege that from December of 1991, until her death, Alexis Colon was sexually harassed in the workplace by Sergeants McDonald and Aries.

On April 27, 1992, Alexis and Luis Colon reported the sexual harassment by the two sergeants to a superior, Army Sergeant Major Hutchens, and they were told by Sergeant Major Hutchens that the two men would be moved out of the area where Alexis Colon was assigned. Instead, on April 29, 1993, Lieutenant Colonel Waddell, the officer in charge of the dental clinic, and Sergeant Leonard called Alexis Colon into Lt. Colonel Waddell's office. There, Alexis Colon was issued a written reprimand for "conduct unbecoming a soldier in the form of sexual harassment" and she was threatened with disciplinary measures should additional incidents of sexual harassment occur. She was also directed to teach a class on sexual harassment. (*See* Complaint, Exhibit D.) Later that day, on April 29, 1993, Alexis Colon shot and killed herself.

Plaintiffs filed a notice of claim with the Army on May 3, 1993. The claim was rejected on May 13, 1993. On September 8, 1993, plaintiffs filed their claim in this Court. On February 22, 1994, the Court granted defendant United States' motion to dismiss the complaint against the United States, pursuant to the *Feres* doctrine.[1]

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[1] The *Feres* doctrine provides that a soldier may not recover under the Federal Tort Claims Act for injuries that "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950).

Now, two of the individual defendants, Lieutenant Colonel Waddell and Sergeant Leonard, have moved to dismiss plaintiffs' claims against them for lack of subject matter jurisdiction.

II.

A.

Plaintiffs have asserted two bases of jurisdiction for their action against Lieutenant Colonel Waddell and Sergeant Leonard: 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 1343(a)(4) (civil rights and elective franchise).[2] As is discussed at length below, subject matter jurisdiction is lacking for each of the asserted jurisdictional bases.

1. Subject Matter Jurisdiction Under 28 U.S.C. § 1343(a)(4) (Civil Rights and Elective Franchise).

28 U.S.C. § 1343(a)(4), entitled "Civil rights and elective franchise," provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

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[2] The plaintiffs have conceded that neither the Military Claims Act nor the Federal Torts Claims Act provides a jurisdictional basis for suit against the individual defendants.

28 U.S.C. § 1343(a)(4). Section 1343(a) does not, by itself, create a right of action, but instead confers jurisdiction for the district court to hear damage cases based on an alleged violation of an underlying federal civil rights statute.

Plaintiffs' Third Claim for relief is brought under Title VII, 42 U.S.C. § 2000(e), et seq. The Ninth Circuit has held, however, that Title VII does not apply to uniformed members of the military. *Gonzales v. Department of the Army*, 718 F.2d 926, 928-29 (9th Cir. 1983). The court stated:

> In light of [the case law], the legislative history, and the pertinent statutory language, we hold that section 717(a) does not make Title VII of the Civil Rights Act of 1964 applicable to uniformed members of the armed forces. Accordingly, the district court's holding that appellant has no right of action under Title VII is affirmed.

Id.

Plaintiffs argue that *Gonzales* is based only upon an analysis of semantics, and urge the Court to rely on *Hill v. Berkman*, 635 F. Supp. 1228, 1237-39 (E.D.N.Y. 1986). In *Hill*, Judge Weinstein held that uniformed members of the armed services are covered by Title VII. Although plaintiffs may disagree with the reasoning of *Gonzales*, it is the law of the Ninth Circuit, and this Court is bound to follow it.[3] Additionally, *Hill v. Berkman*, upon which the

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[3] Furthermore, every Court of Appeals that has addressed this issue has held that Title VII is not applicable to uniformed members of the armed services. *See Doe v. Garrett*, 903 F.2d 1455,

plaintiffs rely, has been abrogated by the Second Circuit. *See Roper v. Department of the Army*, 832 F.2d 247, 248 (2d Cir. 1987) ("While these arguments [in *Hill*] carry weight, we cannot agree to the extension of Title VII ~~to~~ uniformed members of the armed forces.")

Thus, as plaintiffs have no right of action under Title VII, Section 1343(a) does not confer jurisdiction on the Court.

2. Subject Matter Jurisdiction Under 28 U.S.C. § 1331 (Federal Question).

Plaintiffs' remaining jurisdictional basis is 28 U.S.C. § 1331 (federal question jurisdiction). Plaintiffs have alleged causes of action against Waddell and Leonard under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which provides a cause of action to recover damages against individual defendants for constitutional violations. Plaintiffs' *Bivens* claims, however, are barred by the *Feres* doctrine.

The *Feres* doctrine provides that a soldier may not recover under the Federal Tort Claims Act for injuries that "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). In *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United*

1461 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1102 (1991); *Stinson v. Hornsby*, 821 F.2d 1537, 1541 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Roper v. Department of the Army*, 832 F.2d 24, 248 (2d Cir. 1987); *Johnson v. Alexander*, 572 F.2d 1219, 1223-24 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978); *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981).

States v. Stanley, 483 U.S. 669 (1987), the Supreme Court extended the *Feres* doctrine to *Bivens* actions by service members against other service members.

In *Chappell*, five enlisted men in the Navy attempted to maintain a suit against their superior officers (including three noncommissioned officers) for racial discrimination. The Supreme Court unanimously rejected the plaintiffs' claim, concluding that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Id.* at 304 (citation omitted). Therefore, the Court held "that enlisted miliary [sic] personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Id.* at 305. In *United States v. Stanley*, 483 U.S. 669 (1987), the court clarified its ruling in *Chappell* by holding that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.' " *Id.* at 684 (quoting *Feres*, 340 U.S. at 146).

Thus, the Court must determine if the injuries Alexis Colon allegedly suffered at the hands of Lieutenant Colonel Waddell and Sergeant Leonard were "incident to service." The Supreme Court has identified several factors for evaluating whether conduct is "incident to service," including whether the suit would require the court to second guess military decisions, *see Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673, and whether the suit would impair essential military discipline, *see Chappell v. Wallace*, 462 U.S. 296, 300, 304 (1983).

Plaintiffs argue that sexual harassment cannot be defined as "incident to service," and, thus, plaintiffs' *Bivens* claims against Lieutenant Colonel Waddell and Sergeant Leonard are not barred by the *Feres* doctrine. Plaintiffs claim that Lieutenant Colonel Waddell and Sergeant Leonard charged Alexis Colon with conduct unbecoming a soldier in retaliation for reporting sexual harassment. Thus, plaintiffs' *Bivens* claims against Lieutenant Colonel Waddell and Sergeant Leonard are based on the decision by these two defendants to discipline Alexis Colon. The exercise of disciplinary power falls within the scope of *Feres*.

Plaintiffs' reliance on *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991), is misplaced. In *Lutz*, the court allowed the plaintiff, a former Air Force Major, to maintain a *Bivens* action against two of her subordinates. The court noted that the plaintiff's complaint had "also asserted claims against her superiors and the Secretary of the Air Force for failing to discipline the sergeants and imposing discipline on her without adequate procedures[.]" 944 F.2d at 1485. Because those claims had been dismissed and were not before the court, the court had only to deal with the "narrow question" of whether Lutz's injuries at the hands of the sergeants were incident to the service. *Id.* In regard to the claims against Lutz's superiors and the Secretary of the Air Force, the court stated: "We note parenthetically that such claims (for negligent supervision or challenging disciplinary decisions) have been found to fall squarely within the prohibited zone protected by *Feres*." *Id.* at 1485 n. 8 (citations omitted).

The actions of Lieutenant Colonel Waddell and Sergeant Leonard, because they dealt with the discipline of a subordinate, "fall squarely within the prohibited zone protected by *Feres*." *Id.* Therefore, plaintiffs cannot maintain the *Bivens* claims against Lieutenant Colonel Waddell and Sergeant Leonard, and the Court does not have federal question jurisdiction. As the Court has also determined that it does not have civil rights and elective franchise jurisdiction, defendants' motion to dismiss must be granted.

Accordingly,

IT IS HEREBY ORDERED that Defendant Waddell and Leonard's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure is GRANTED.

Dated: May 9, 1994.

/s/ William H. Orrick
William H. Orrick
United States District Judge

DO NOT PUBLISH OR INCLUDE IN DATABASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ESTATE OF ALEXIS COLON, et al., Plaintiff, vs. THE UNITED STATES OF AMERICA, et al., Defendants.	)	No. C-93-3320 WHO **MEMORANDUM DECISION AND ORDER** (Filed Feb. 22, 1994)

In this action brought by plaintiffs, Estate of Alexis Colon, Luis Colon (decedent Alexis Colon's husband), and Peaches and Alexander Martinez (decedent's parents), against the United States of America, Lieutenant Colonel Henry T. Waddell, Staff Sergeant Tyronne S. Leonard, Sergeant McDonald and Sergeant Aries, seeking recovery under the Federal Tort Claims Act ("FTCA") for the death of Alexis Colon, the question raised by the United States' motion to dismiss is whether plaintiffs' claim against the United States[1] under the FTCA is barred

[1] At the time the United States brought its motion, none of the four individual defendants had been served, so the United States confined its motion to addressing plaintiffs' complaint as it pertained to defendant United States. Thus, the Court's order only applies to the plaintiffs' claims against the United States, and the Court does not address the issue of whether the *Feres* doctrine bars claims against the individual defendants.

by the *Feres* doctrine.[2] For the reasons hereinafter stated, the United States' motion to dismiss is granted.

I.

This action arose from the circumstances surrounding the tragic death of Alexis Colon on April 29, 1992, by a self inflicted gunshot wound. At the time of her death, Alexis Colon and her husband, Luis Colon, were serving on active duty in the United States Army. Alexis Colon was a Specialist, assigned to duty as a Dental Technician at Dental Clinic #5 at Fort Hood, Texas.

Plaintiffs allege that from December of 1991 to the date of her death, Alexis Colon was sexually harassed in the workplace by Sergeants McDonald and Aries. The sexual harassment included lewd verbal comments and sexual invitations from Sergeant McDonald, and touching of Alexis Colon's hair and kissing of her cheek by Sergeant Aries. The harassment was so severe, according to the complaint,[3] that Alexis Colon experienced anxiety, weight loss, sleeplessness, and depression.

On April 27, 1992, Alexis and Luis Colon reported the sexual harassment by the two sergeants to a superior, Army Sergeant Major Hutchens, and they were told by

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[2] The *Feres* doctrine provides that a soldier may not recover under the FTCA for injuries that "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135 (1950).

[3] At this stage of the proceedings, the Court accepts all factual allegations in the complaint as true for the purposes of this motion to dismiss.

Sergeant Major Hutchens that the two men would be moved out of the area where Alexis Colon was assigned. Instead, on April 29, 1993, Lieutenant Colonel Waddel, officer in charge of the dental clinic, and Sergeant Tyronne Leonard called Alexis Colon into Lt. Colonel Waddell's office. There, Alexis Colon was issued a written reprimand for "conduct unbecoming of a soldier in the form of sexual harassment," and she was threatened with disciplinary measures should additional incidents of sexual harassment occur. She was also directed to teach a class on sexual harassment. (*See* Complaint, Exhibit D.)

Later that day, on April 29, 1993, Alexis Colon shot and killed herself. She left behind a note that said, among other things, that she was "too weak and ashamed to face these people" and "too weak and ashamed to live." (*See* Complaint, Exhibit F.)

Plaintiffs filed a notice of claim under the FTCA with the Army on May 3, 1993. The claims were rejected on May 13, 1993, in a letter which cited the *Feres* doctrine. On September 8, 1993, plaintiffs filed their claim in this Court.

II.

A.

The United States has moved to dismiss plaintiffs' claims against the United States for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiffs have asserted four bases of jurisdiction: the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680; 28 U.S.C. § 1331 (Federal

question); 28 U.S.C. § 1343(a)(4) (Civil rights and elective franchise); and the Military Claims Act, 10 U.S.C. § 2733. The United States asserts that subject matter is lacking for each of the asserted jurisdictional bases.

B.

The United States is correct that neither federal question jurisdiction, civil rights and elective franchise jurisdiction, nor the Military Claims Act provide a basis for jurisdiction.

While 28 U.S.C. § 1331 (Federal question) and 28 U.S.C. § 1343(a)(4) (Civil rights and elective franchise) do provide congressional grants of jurisdiction, neither statute contains a waiver of sovereign immunity. The United States is a sovereign, and, therefore, is immune from suit unless if has *expressly* waived such immunity and consented to be sued. *See, e.g., United States v. Shaw,* 309 U.S. 495, 500-501 (1940). Where a suit has not been consented to by the United States, dismissal of the action is required. *Hutchinson v. United States,* 677 F.2d 1322, 1327 (9th Cir. 1982). "It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction." *United States v. Mitchell,* 463 U.S. 206, 212 (1983).

Neither Section 1331 nor the Section 1343(a)(4) of 28 United States Code contains a waiver of sovereign immunity so these statutes, by themselves, cannot confer jurisdiction. *See, e.g., Gilbert v. DaGrossa,* 756 F.2d 1455, 1458 (9th Cir. 1985) ("28 U.S.C. § 1331 merely provides that the district court shall have original jurisdiction in all civil actions arising under the Constitution, laws, or treaties of

the United States . . . It cannot by itself be construed as constituting a waiver of the government's defense of sovereign immunity.")

The Military Claims Act provides a statutory basis for the head of each military service to pay administrative claims arising out of certain in-scope activities of service personnel. The Military Claims Act provides neither a congressional grant of jurisdiction for filing suit in district court nor an express waiver of sovereign immunity. Thus, the Military Claims Act cannot confer jurisdiction on the plaintiffs.

C.

Unlike the preceding three statutes, the FTCA does expressly waive sovereign immunity. The United States, however, contends that Alexis Colon's claim under the FTCA is barred by the *Feres* doctrine, which provides that a soldier may not recover under the FTCA for injuries that "arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950).

Three rationales have been identified as the basis for the *Feres* doctrine: (1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems; and (3) the fear of damaging the military structure." *Atkinson v. United States*, 825 F.2d 202, 204 (9th Cir. 1987) (citing *Stencel v. Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977)).

Feres has been strongly criticized over the years, including fairly recently in Justice Scalia's strongly worded dissent in *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received") (quoting *In re "Agent Orange Product Liability Litigation*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)). However, the Ninth Circuit, in "reluctantly" affirming a dismissal based on the *Feres* doctrine, has noted that the "overall trend" is for broad deference to things military and broad application of the *Feres* doctrine. *Persons v. United States*, 925 F.2d 292, 293-95 (9th Cir. 1991).

The Supreme Court has stated that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules." *United States v. Shearer*, 473 U.S. 52, 57 (1985). Thus, with no bright-line guidance, the Ninth Circuit has adopted the "intellectually unsatisfying" practice of "comparing fact patterns in previous cases with that in the case before them in an effort to produce the most appropriate outcome." *McAllister v. United States*, 942 F.2d 1473, 1477 (9th Cir. 1991).

The United States, in light of the above approach, argues that the outcome of dismissal is compelled in this case because of the factual similarity to *Stubbs v. United States*, 744 F.2d 58 (8th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985). As in this action, *Stubbs* involved a claim for the wrongful death of a young female soldier who killed herself after being sexually harassed by a military superior.

In *Stubbs*, the decedent was a private assigned to Fort Leonard Wood, Missouri. She was ordered to the latrine by her drill sergeant, for what she thought would be last minute cleaning before she left for the Christmas holidays. Instead, the drill sergeant told her that if she had sexual intercourse with him he would make the remainder of her stay at Fort Leonard Wood easier, but if she refused it would be rougher on her. He also touched her breasts and genital area against her will. She refused his advances and left for the holidays. On the morning she was to return to Fort Leonard Wood, she told her sister she would not return to the base to subject herself to further sexual harassment, and killed herself with a shotgun blast to the head.

The appeals court focused on three factors in determining whether a relevant relationship existed between the service member's activity and the military service. The court concluded that the first two factors, the duty status of the service member at the time of the injury and the location of the injury, weighed in favor of applying *Feres*. The third factor that the court considered was "whether the activity out of which the action arose served some military purpose or mission." *Id.* at 60 (citing *Brown v. United States*, 739 F.2d 362, 368 (8th Cir. 1984)). The court did not delve into this factor closely, stating that "[w]hile the sexual harassment certainly served no military purpose, we believe that, on balance with the other two factors, a relevant relationship between Stubbs' activity at the time of the incident and her military service has been shown." *Id.*

The court went on to analyze the deleterious effect on military discipline if the plaintiffs were allowed to

maintain the suit against the United States. The court noted that:

> The trial would undoubtedly question the interaction between an officer and this subordinate. Moreover, at least part of Stubbs' cause of action is premised on allegations that military superiors were aware of sexual harassment of female enlisted personnel on the base, and yet did nothing to prevent it. It is also alleged that the military establishment would have resisted any claims of sexual harassment leveled at its noncommissioned officers and would have labeled Stubbs a troublemaker had she complained about the incident. The claim thus appears to be that the United States created the atmosphere which ultimately led to Stubbs' suicide. This claim would directly question the disciplinary decisions of superior officers in failing to prevent the incident and in creating a situation where enlisted personnel are discouraged from making complaints. All of these inquiries go to the heart of military decisionmaking and discipline, and thus are barred by *Feres*.

Id. at 60-61.

In the United States' view, the *Feres* doctrine resulted in dismissal of the *Stubbs* case, and *Stubbs* controls this case, so the Court must dismiss this case.

Plaintiffs, however, do not concede that *Stubbs* controls. They argue that *Stubbs* was wrongly decided because sexual harassment is not a legitimate military activity, and thus, Alexis Colon's death as a result of harassment and retaliation for reporting it, is not "incident to service." (*See* Pl.'s Opp. at 13.) In support of this contention, plaintiffs rely primarily on two cases: *Lutz v.*

Secretary of the Air Force, 944 F.2d 1477, 1487 (9th Cir. 1991), and *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984).

In *Lutz*, the Ninth Circuit case, the plaintiff was a former air force major who brought an action against former subordinates, asserting *Bivens* and common law claims based on subordinates' breaking into her office after hours, taking her personal papers and mail, and disseminating them to other military personnel with the intent to injure her reputation and career. The subordinates appealed the district court's refusal to grant their motion to dismiss on the grounds of *Feres* intra-military immunity. The Ninth Circuit denied immunity to the individual defendant subordinates, stating that the court, "like the district court, cannot fathom how [the activities of the subordinates] can be construed to be 'activities incident to service.' ". *Id.* at 1486.

In *Brown*, the second case that the plaintiffs strongly rely on, the action arose from the attempted suicide of a black national guardsman who was subjected to a mock lynching at an on-base party. His mother/conservator brought suit under the FTCA. The Eighth Circuit in *Brown*, applying the same analysis as in *Stubbs* and considering whether the activity out of which the action arose served some military purpose or mission, concluded that "[t]he activity in this case – a racially tinged mock hanging of a fellow soldier – served no conceivable or remote military purpose." *Id.* at 368. Therefore, the Court denied the individual perpetrators of the mock lynching immunity under *Feres*.

Based on *Lutz* and *Brown*, the plaintiffs argue that the sexual harassment of Alexis Colon cannot conceivably have served any military purpose. Thus, they argue, her death was not "incident to service," and *Feres* is inapplicable.

Despite plaintiffs' arguments, their claims against the United States must be dismissed under the *Feres* doctrine. However, this decision is not compelled by *Stubbs*,[4] but rather by *Lutz* and *Brown*, the very opinions the plaintiffs relied upon.

In *Brown*, the court analyzed the plaintiff's claims against various individuals and placed them in three categories: "(1) the failure to prevent the hanging incident, (2) the actual participation by certain individuals in

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[4] The United States is correct that *Stubbs* is very factually similar to the instant case. However, the *Stubbs* opinion is by no means convincing in its conclusion that the *sexual harassment* itself had a relationship to a military purpose or mission. A careful examination of the language of *Stubbs* showed that the court dodged the issue of what was, exactly, the relationship of the sexual harassment to any military purpose or mission. The court even noted the problem of trying to enunciate a relationship, but then glossed the problem over by stressing the fact that Stubbs was on duty and the harassment took place on base: "[w]hile the sexual harassment certainly served no military purpose, we believe that, on balance with the other two factors, a relevant relationship between Stubbs' activity at the time of the incident and her military service has been shown." 744 F.2d at 60.

Thus, insofar as *Stubbs* granted *Feres* immunity to the individual perpetrator of the sexual harassment, there are problems in the *Stubbs* court's analysis. The *Stubbs* court did reach the correct result in dismissing the claims against military superiors and the United States, as *Lutz* and *Brown* demonstrate.

the hanging incident, and (3) the failure to perform a proper investigation of the incident." 739 F.2d at 369. The court found that the first and third claims, if litigated, would have a damaging effect on the military disciplinary structure, stating that the [sic] such claims "strike [ ] precisely at the type of command relationship between a service member and his or her superior officers that is at the heart of military structure" and "strike [ ] directly at military decisionmaking with respect to a disciplinary matter." *Id.* Thus, the court in *Brown* dismissed the plaintiff's claims against the United States and against the guardsman's superior officers as barred by the *Feres* doctrine, and only sprared the claims against the *individual* defendants.

In *Lutz*, the court noted that Lutz's complaint had "also asserted claims against her superiors and the Secretary of the Air Force for failing to discipline the sergeants and imposing discipline on her without adequate procedures." 944 F.2d at 1485. Because those claims had been dismissed and were not before the court, the court had only to deal with the "narrow question" of whether Lutz's injuries at the hands of the sergeants were incident to the service. In regard to the claims against Lutz's superiors and the secretary of the Air Force, the court stated: "We note parenthetically that such claims (for negligent supervision or challenging disciplinary decisions) have been found to fall squarely within the prohibited zone protected by *Feres*." *Id.* at 1485 n. 8 (citations omitted). Thus, in *Lutz*, as in *Brown*, the court only held that suits against the individual participants in the incident were not barred by *Feres*.

In the instant case, the plaintiffs' second claim for relief states that Alexis Colon's suffering and death, and the other plaintiffs' injuries, were "a direct and proximate result of the wrongful acts and omissions of the defendant United States set forth herein." (Complaint ¶ 36.) Essentially, the claims against the united States are (1) failure of the military to enforce its own policy and regulations against sexual harassment, (2) failure of the military to prevent the sexual harassment of Alexis Colon, (3) retaliation against Alexis Colon by subjecting her to unjust and pretextual disciplinary action, and (4) failure to adequately investigate the sexual harassment and retaliation.

Under controlling precedent, all these claims "fall squarely within the prohibited zone protected by *Feres*." 944 F.2d at 1485 n. 8. The manner in which the military chooses to implement policies against sexual harassment, or how the military chooses to discipline (or not to discipline) sexual harassers, goes to the heart of military decisionmaking. In the wake of considerable public dialogue about sexual harassment in the military, it may well be that Congress and the public will effectuate changes in military decisions with regard to sexual harassment, but the *Feres* doctrine bars this Court from entering the fray.

Accordingly,

IT IS HEREBY ORDERED THAT:

1. The United States' motion to dismiss plaintiffs' action against the United States for lack of jurisdiction is GRANTED.

Dated: February ___, 1994.
Feb. 18, 1994

/s/ William H. Orrick
William H. Orrick
United States District Judge

TEXT OF ALEXIS COLON'S SUICIDE NOTE

(A copy of this note appears in the Record as Exhibit F to Plaintiffs' Complaint)

I love you Lou and I always will. You have always been a good person and a good husband. I just wished . . . [illegible] wife. But I was always faithful to you remember that. Don't mess up your life like I messed up mine. Don't do anything foolish like me. Don't jeopordize [sic] your career and your life just because of me. I am too weak and ashamed to face those people and you. Try to live a long and healthy life and forget about me. Find someone else that is worthy of you, I'm not worth it. I am too weak and ashamed to live. Living is too much pressure for me and I want out. This is a cowards way and I an a coward. I pray that God will forgive me and my stupidity. I can't look at myself in the mirror. All I see is disgust with myself. Please pray for me Lou please. I will always love you Lou. Please forgive me. Dear God I ask for your forgiveness. Please have mercy on my soul. Please have mercy on my soul. Don't do anything foolish Lou.

A FORM 4858

(A copy of this form appears in the Record as Exhibit D to Plaintiffs' Complaint)

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: 5 USC 301, 10 USC 3012(G).
PRINCIPAL PURPOSE: To record counseling date pertaining to service members.

[Illegible]

DISCLOSURE: Disclosure is voluntary, but failure to provided the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

PART I – BASIC DATA

1. NAME *(Last, First, MI)*
   COLON, ALEXIS

5. UNIT
   USA DENTAC

2. SOCIAL SECURITY NO.
   547-67-2157

3. GRADE
   E-4

4. SEX
   F

PART II – OBSERVATIONS

8. DATE AND CIRCUMSTANCES

On 29 April 1992 a formal counseling session was held in the OIC's office, DC 05, Fort Hood, Texas.

Present in the session were SPC Alexis Colon, SSG Leonard, and LTC Waddell.

You are being counseled on conduct unbecoming of a soldier in the form of sexual harassment. Statements are attached.

9. DATE AND SUMMARY OF COUNSELING

You are being formally counseled that this type of behavior is not and will not be tollerated [sic] in the United States Army, USA Dentac Fort Hood, and DC5. You will immediately cease and desist any and all forms of sexual harassment.

You are directed to contact the post EEO office to arrange for a representative to attend the class you, SPC Colon, will present to the clinic on Friday, 8 May 1992 at 1530 hours on sexual harassment.

Any additional incidents of sexual harassments will be immediately dealt with and disciplinary measure may be taken, to include UCMJ actions.

A copy of this will be place [sic] in your file at the clinic and a copy given to you.

YOU ARE BEING COUNSELED ON YOUR (DUTY PERFORMANCE) (MISCONDUCT), IF THIS CONDUCT CONTINUES IT COULD BE CAUSE FOR SEPARATION ACTION. IF SEPARATED FOR YOUR DUTY PERFORMANCES, THE LEAST FAVORABLE CHARACTER OF DISCHARGE YOU COULD RECEIVE IS A GENERAL DISCHARGE. IF SEPARATED FOR MISCONDUCT, YOU COULD RECEIVE AN UNDER [sic] OTHER THAN

HONORABLE CONDITIONS DISCHARGE, BOTH MAY CAUSE UNDUE HARDSHIPS IN CIVILIAN LIFE AND MAY REFLECT ON YOUR ELIGIBILITY FOR VETERANS'S BENEFITS, ELIGIBILITY FOR REENTRY INTO THE ARMED FORCES AND ACCEPTABILITY FOR EMPLOYMENT IN THE CIVILIAN COMMUNITY.

DISPOSITION INSTRUCTIONS

This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation ETS, or upon retirement.

PART III – AUTHENTICATION

10. NAME, GRADE, SIGNATURE OF COUNSELOR
/s/ Tyronne S. Leonard E-6
TYRONNE S. LEONARD

DATE 29 APR 92

11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I ~~concur~~/**nonconcur** [initialed "AMC"] that the information above accurately reflects this counseling session. I nonconcur for the following reasons:

NO COMMENTS AS OF NOW

12. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED
/s/ Alexis M. Colon SPC/E-4

DATE 29 APRIL 92

13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK.

PART IV – REHABILITATION

14. REHABILITATION RESULTS/COMMENTS

[BLANK]

15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED [BLANK]

DATE [BLANK]

16. NAME, GRADE, SIGNATURE OF COUNSELOR [BLANK]

DATE [BLANK]

PART V – UNIT COMMANDER INTERVIEW

17. INTERVIEW RESULTS AND RECOMMENDATION

[BLANK]

18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER

[BLANK]

DATE [BLANK]

EXHIBIT

B

I HAD AN APPOINTMENT AND I DID NOT HAVE MY CAR: SGT McDONALD GAVE ME A RIDE IN HIS CAR. HE TOLD ME ABOUT THE RELATIONSHIP BETWEEN HIM AND PFC WOODS AND PFC PALMER. HE SAID SOMETHING ABOUT HOW PFC PALMER TOLD EVERYBODY ABOUT HIM AND HER. HE ALSO TOLD ME HOW PFC PALMER'S VAGINA SMELLED. AFTER THAT CONVERSATION. HE ASKED ME IF I HAD SEX WITH TWO MEN. I WAS SURPRISED HE ASKED THAT, I FIRMLY TOLD HIM NO. I WAS WAITING FOR MY HUSBAND TO PICK ME UP AT THE BACK DOOR AT DC #5. SGT McDONALD SAT NEXT TO ME AND TOLD ME THAT HE HAD SEX WITH A FAMILY MEMBER WIFE AND SAID IT WAS GOOD. HE ALSO TOLD ME HE HAS NEVER HAD SEX WITH A SOLDIER THAT WAS A WIFE OF ANOTHER SOLDIER. THIS ALSO MADE ME FEEL UNCOMFORTABLE. SGT McDONALD TALKED MUCH ABOUT IT AND SAID I BETTER STOP BEFORE I GET IN TROUBLE FOR SEXUAL HARRASMENT. IN THE CONFERENCE ROOM HE TALKED ABOUT THE DENTAC FEMALE SOFTBALL TEAM. HE SAID SOMETHING ABOUT HE LIKES TO GO TO SEE TITS (BREASTS) BOUNCE AROUND. HE ALSO SAID THAT MALES ARE BETTER AT SOFTBALL THAN FEMALES. DURING THE TIME DC #5 WAS GETTING NEW CHAIRS – AS SGT ZELINSKI TOLD ME TO WATCH THE FRONT DESK. EVERYBODY ELSE WAS TAKING OUT THE TRASH THAT WAS LEFT IN THE CLINIC. THERE WERE SOME BLUE LIGHTWEIGHT TRASH LARGE AND SMALL. PVT . . . [ILLEGIBLE] TRASH AND SGT McDONALD SAID SOMETHING LIKE DON'T TAKE THOSE. LEAVE THAT FOR THE FEMALES SO THEY WILL HAVE SOMETHING TO DO. THE EVENTS AND CONVERSATIONS TOOK PLACE AT

DENTAL CLINIC #5 BETWEEN DEC. 91 THROUGH APR OF 1992, SGT ARIES KISSED MY CHEEKS AND IT MADE ME FEEL UNCOMFORTABLE. HE KISSED MY CHEEK AGAIN THAT SAME WEEK. I ASKED HIM POLITELY NOT TO DO IT ANYMORE BECAUSE I DID NOT WANT PEOPLE TO GET THE WRONG IDEA AND IF MY HUSBAND FINDS OUT HE WOULD BE FURIOUS. SGT ARIES WOULD PLACE HIS HAND ON THE BACK OF MY HEAD AND RUN HIS FINGERS IN MY HAIR. A CONVERSATION WAS GOING ON IN THE CONFERENCE ROOM ABOUT HOW THE WORLD IS BECOMING A TERRIBLE PLACE BECAUSE OF DRUGS, SEXUAL ABUSE, ETC. SGT JONES WAS TALKING ABOUT SOMETHING THAT HAPPENED IN THE NEWS. SGT JONES SAID THAT A MORTICIAN WAS CAUGHT HAVING SEX WITH A DEAD WOMAN IN THE WOODS. SGT ARIES AND SGT McDONALD LAUGHED. SGT ARIES SAID IF SHE WAS FINE HE WOULD HAVE SEX WITH A DEAD BODY. MR. TAYLOR SAID, "YOU WOULD, THAT'S SICK. I HAVE SEEN SGT ARIES KISS AND RUN HIS FINGERS THROUGH SOME OF THE FEMALES' HAIR AT DC #5. I WAS AT SUPPLY TRYING TO EXPLAIN WHY BAY 1 USED A LOT MORE SUPPLIES THAN THE OTHER BAYS. WHILE I WAS EXPLAINING TO SGT McDONALD, HE SAID, "IF YOU KEEP ASKING EVERY 10 MINUTES I'LL PUT YOUR LIST AT THE BOTTOM. DURING THIS SITUATION SGT ARIES TOLD ME TO AT EASE AND I STOPPED. [ILLEGIBLE] WAS TRYING TO GIVE AN EXPLANATION OF THE SITUATION. SGT ARIES TOLD ME TO AT EASE OR ELSE HE WAS GOING TO GIVE ME AN ARTICLE 15. DURING THE TIME I WAS AT SUPPLY TRYING TO EXPLAIN TO SGT McDONALD ABOUT BAY 1 SUPPLY SITUATION. HE TOLD ME THAT IF I ASK EVERY TEN MINUTES HE WOULD PUT MY LIST AT THE BOTTOM. I DID NOT ASK HIM FOR SUPPLIES EVERY TEN MINUTES. I ASKED ONLY ONCE OR TWICE A DAY THAT

WEEK. I WAS ONLY CONCERNED FOR THE PEOPLE IN BAY 1. WE HAVE HAD TO BORROW FROM THE OTHER BAYS. LATER THAT MORNING I APPROACHED SGT McDONALD AND SAID SOMETHING TO THE EFFECT THAT I JUST WANTED TO GIVE HIM AN EXPLANATION OF THE SITUATION BAY 1 HAS IN SUPPLIES. HE TOLD ME THAT VOICING MY OPINIONS WOULD GET ME IN TROUBLE. LATER THAT MORNING SGT ZELINSKI WAS PAGING SGT McDONALD SEVERAL TIMES. SGT McDONALD WAS OUTSIDE HELPING TO GIVE A JUMP START TO A CAR. WHEN HE CAME IN THE CLINIC. I TOLD HE SGT ZELINSKI WAS PAGING HIM AND HE IGNORED ME. I ONLY DID IT OUT OF CONSIDERATION BECAUSE IT MIGHT HAVE BEEN IMPORTANT.

/s/ Alexis M. Colon
PFC/E-4

END OF MESSAGE

EXHIBIT

E

TO PLAINTIFF'S COMPLAINT

DEPARTMENT OF THE ARMY
HEADQUARTERS III CORPS AHO FORT HOOD
FORT HOOD, TEXAS 76544-5000

COMMAND POLICY

NUMBER 22

[LOGO] [LOGO]

FZF-GA-EO (600-20) 30 March 1992

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Sexual Harassment Policy

PURPOSE. The purpose of this policy is to define sexual harassment and to emphasize the importance of establishing an environment free of sexual discrimination.

APPLICABILITY. This policy applies to all military, family members, and civilian employees and contract personnel assigned to or employed by any III Corps unit, or Fort Hood staff office, [illegible] organization and activity assigned, attached, or supported by Fort Hood.

BACKGROUND.

a. Sexual harassment is a form of sex discrimination that [illegible] other verbal or physical contact of a sexual nature, sexual harassment occurs when:

(1) submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or

(2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

(3) such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

b. Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment.

POLICY.

a. Sexual harassment violates acceptable standards of honesty, integrity, and impartiality and will not be tolerated.